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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 384

A. Glendon Johnson, Administrator c.t.a. Estate of A. Gales Johnson,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDICES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on May 31, 1962, and the Decision entered April 27, 1962 under the same caption in the same matter. The said Decision of the Circuit Court affirmed a Supplemental Memorandum Findings of Fact and Opinion of the Tax Court of the United States entered Sept. 26, 1961, and the said Order of May 31, 1962, denied a duly filed Petition for a Rehearing.

OPINIONS BELOW

The Supplementary Memorandum Findings of Fact and Opinion of the Tax Court (not officially reported) is printed in the separate gray cover *Appendix B for the Petitioner, 8508* (copies of which are attached hereto). The Decision of the Court of Appeals (reported at 302 F. 2d 86) is printed herewith as Appendix A, its Order as Appendix B; Copies of the *Petition for a Rehearing* are attached hereto (light green, 8508); and the Order denying the same is printed herewith as Appendix C.

JURISDICTION

The Decision of the Court of Appeals was entered April 27, 1962, and the Order denying the Petitioner for a Rehearing was entered May 31, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

This case involves the interpretation of, or the proper rate of depreciation and obsolescence allowable under, Section 23 (1) of the Internal Revenue Code of 1939 and Sections 29.23(1)-1 and 29.23(1)-5 of Treasury Regulations 111. (Printed herewith as Appendix D.)

QUESTIONS PRESENTED

1. Where obsolete and out-of-publication designs had no known salvage value other than their declining residual sales,—where the known gross sales from 25 of those obsolete designs had reached some 80-85% of their estate

taxed value, (and would apparently aggregate only a total of 90-95%) when the fact of their obsolescence was discovered and reported to the Revenue Department with a request for instructions on how to reconcile values or amortize these assets (in the original Fiduciary Income Tax Returns),—was the Revenue Department justified in its attempt to tax these residual sales as *ordinary income* or should the taxpayer have been permitted to set aside this income as received to amortize the assets in question from their own sales, or their equivalent, so far as practical?

2. Where the Tax Court was under specific instructions from the Court of Appeals to "determine the proper rate of depreciation—on the merits—after considering *all* the facts—in order to work out a just result—", was the Tax Court required to use, or justified in selecting, a straight-line schedule of depreciation for the above mentioned obsolete assets, where it was obvious that this method (and the "life" assumed) would permit the taxpayer to recover less than half of these assets' value from their residual sales, and would inadvertently throw the majority of the "allowed or allowable" depreciation into tax years long since closed to the taxapyer?

3. Did the Court of Appeals err in its failure to grant equitable relief,—in its reluctance to specify, and require, accelerated depreciation on these obsolete and out-of-publication designs?

STATEMENT

At issue in this proceeding is the proper depreciation or obsolescence allowance on capitalized business assets.

25 basic designs dropped from publication by the previous owner, prior to his death, but still producing some residual sales at the time they were appraised for the D.C. Probate Court (and of course the Federal Estate Tax).

After determining that the business could be continued (rather than liquidated) and in the course of preparing the original income tax returns, the above mentioned 25 designs, included in the original appraisers' inventory, were found to have been discontinued from publication by the previous owner, and to have produced some $18,—20,000 worth of gross "income" in the years of the Administration; but that their declining rate of sales was such that they would be unlikely to repay to the estate, or any succeeding owners, their capital values, as assessed (and on which Estate Tax was paid).

After consultation with the Revenue Department, and upon the suggestion or approval of its advisory personnel, the *amount* of the capital values of the 25 designs was proportionately added to or amalgamated with the appraised values of the remaining designs which were in current publication (rather than setting up this 25 as a special class), in order to secure a simplified formula of cost accounting (covering both functional depreciation and economic obsolecence).

The problem arose when a field auditor of the Revenue Department "determined" that the 25 designs were not worth their Estate Tax paid evaluation because they had contributed only 53% of their proportionate part of the 1950,-'51 & '51-'52 gross sales—and forthwith attempted to "simplify" the depreciation bookkeeping by *discarding* 47% of their value: ($11,659.99).

This patent injustice to the taxpayer was reversed in the first trip to the Court of Appeals. In the second trip up the Court of Appeals reversed the Commissioner in his attempt to place these 25 discontinued plans on an assumed 20-year-life depreciation schedule (the same as plans in current publication) and directed the Tax Court to determine "the proper rate of depreciation to be applied to those plans—on the merits, after considering *all* the facts, in order to work out a just result—". (emphasis added by the Court of Appeals).

Contrary to the Petitioner's understanding of the apparent intent of the Revenue Act, and the interpretation of this Court, allowing (or requiring) business assets to be fully amortized at the end of their useful life—and to reflect their "depreciation", so far as practical, into "the periods to which they contribute income—" the present "ultimate conclusion of fact" of the Tax Court permits the taxpayer to recover less than half of the allowable depreciation from the income of the assets in question, and allocates the majority of it to tax years of insufficient income, (and those now closed)—thus creating a greater injustice, or discard of depreciation, than that which the Court of Appeals refused to countenance in the beginning.

The Court of Appeals appears to have assumed (erroneously?) that the only potential source of relief was in the provisions of the Revenue Act of 1954, not available to the Petitioner on the 1951-'52 returns.

Reasons for Granting the Writ

It is respectfully submitted that the 1960 landmark case of Massey Motor vs. United States 364 U.S. 92 presented no *startling reverse* or "revelations" but rather

a long overdue *clarification* of the inherent principles of sound depreciation cost accounting, and an intelligent interpretation of the equitable ends intended by the legislative makers of the controlling Revenue Acts.

It is quite apparent that this Decision may have been required or intended primarily to arrest, prevent, or "head off" a special type of taxpayers' abuse or fraud; but the broad and inclusive language used to establish the principles relied upon would seem to impress an equal burden, *duty* and *responsibility*, upon the Revenue Department, *and* the *Courts*, to likewise uphold the legal and equitable rules of accounting propounded by this court,—"when the shoe is on the other foot", and the *Taxpayer* is *due* a "meaningful allocation."

In view of Justice Clark's 1960 statement on "meaningful allocations" that "This accounting has had the approval of this Court since U.S. vs. Ludley, 1927, 274 U.S. 295, when Justice Brandeis said 'The theory underlying this allowance for depreciation is that by using up the plant a gradual sale is made of it—' "—and a whole foundation of law apparently well established a third of a century earlier (than 1960), the respondent's argument that the taxpayer was entitled to use only a straight line method of depreciation appears to be *strained*, to put it mildly,—when applied to these out-of-publication designs reported to the Revenue Department, prior to filing the tax return.

The act of the Tax Court in equating $25,227.50 of depreciation over and across a period of 5 years, ($5,045.50 per year), when the income was known to the Court to have been received in increments of $14,300, $4,475, $2,325, $1,150 and $709, (with less than $1,000 of receipts during the next 5 years)—where less than half

the tax value "Cost" would be recovered from the income of this property, and over half would fall in unavailable periods—this was not according to the Mandate of the Court of Appeals "to work out a just result—" and is almost in defiance of *Massey Motors*.

In the three hearings before the Court of Appeals its members have repeatedly chided the counsel from the Justice Department about (1) the "patent unfairness" of the Revenue Department's "determination"—and its effort to sustain different evaluations for Estate Tax vs. Income Tax purposes; (2) the "obvious consistency" of the "taxpayer's efforts to allocate the depreciation" of the specific assets proportionately "in the years" in which "those particular assets returned income"; and the (3) "equity of the Petitioner's position"—as justification for an overall refiguring and re-allocation of the depreciation or amortization of these particular assets, on a specific, and special basis, "after considering *all* the facts." (emphasis added by the Court of Appeals).

It is most respectfully suggested that the Court of Appeals was understandably weary, but in no wise legally bound, to permit a constructive fraud upon the taxpayer. And the Court of Appeals erred in assuming that either it or the taxpayer must rely upon—or look in vain for unavailable help in the 1954 act of Congress designed to circumvent the perpetrations of a known pattern of injustice to taxpayers by the Revenue Department, comparable to the known facts in this case, to secure compliance with the Court of Appeals' previous directives.

In its Decision of Case 7874, wherein the Tax Court had permitted the Revenue Department to simply discard for income tax depreciation nearly $12,000 worth of value

on which another branch of the Department had collected estate taxes, the Court of Appeals reminded the Tax Court that "simple fairness" required the recognition of these same values for depreciation purposes. On a second time up, 8193, the Court of Appeals directed the Tax Court to determine "the proper rate" (of depreciation) "—in order to work out a just result—".

Both Appeals, and both Remands are made futile indeed, if in fact the Tax Court is permitted (or the taxpayer is required) to so allocate an insufficient amount of depreciation to the tax year for which that income was actually derived,—and at the same time retroactively allow and assign excess depreciation to tax years long since closed, where it is meaningless.

This, the Petitioner submits is contrary to the principles of proper cost accounting; to the intent of Congress in granting the tax free recovery of the cost of capital goods used in producing income; and the obligation or responsibility which goes with the extra authority vested in most higher Courts to grant equitable relief, where and when the law's purpose is known, but the statutes are not sufficiently clear or specific to command it.

It is the assumption of the Petitioner, and urged as a precept, that the Courts as such, and the Judges thereof are in theory—in principle, and in fact—the keepers of the conscience of our laws; and that they are impressed with the specific duty of discerning the basic intent and achieving the overall purpose of the general Statutes, the controlling Regulations, and specific Rulings compatable with or contributing to the attainment of those objectives.

Where the well known end result to be secured was (and

still is) the taxpayer's simple one-time recovery of his capital cost as a deductible charge against the income of specific cash producing business assets (and for, or at the end of their economic life): where the previously secured and specifically followed advice of the Revenue Department on how to handle this depreciation problem has been upset by a Revenue Agent, the Tax Court and the Court of Appeals— and the Court of Appeals has specifically directed the Tax Court to re-determine "the proper rate of depreciation . . . on the merits, after considering *all* the facts, in order to work out a just result. . . ."—it was in fact a default in duty, or abuse of discretion for the Tax Court to set up a straight line depreciation schedule for an assumed life of 5 years—with its known results.

The Petitioner may in this instance, be able to stand the injustice which the Revenue Department appears so intent upon perpetrating; but an undistrubed pattern of self-serving Regulations administered in a self-serving manner —and unimpeded by the Courts, either in the interest of expediency, or through indifference—will in the long run produce incalculable injury to the image of fairness which should attach to the Revenue Department, and the Courts.

Conclusion

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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August 20, 1962

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8508.

A. Glendon Johnson, Administrator,
c.t.a., Estate of A. Gales Johnson,
Petitioner,

versus

Commissioner of Internal Revenue,
Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

(Argued March 28, 1962. Decided April 27, 1962.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BRYAN, Circuit Judges.

A. Glendon Johnson, Pro Se, and Crombie J. D. Garrett, Attorney, Department of Justice, (Louis F. Oberdorfer, Assistant Attorney General, and Lee A. Jackson and Melva M. Graney, Attorneys, Department of Justice, on brief) for Respondent.

HAYNSWORTH, Circuit Judge:

This case is here for the third time. It is another phase of a protracted controversy over depreciation of certain master plans of houses, from which the taxpayer made blue prints and material lists for sale to customers.

All of these master plans had been appraised for estate tax purposes, as of the date of death of their former owner in 1950, at $173,055. The administrator of the estate of the former owner sought to use the estate tax basis as the basis of depreciation deductions on his income tax returns for the fiscal years 1951 and 1952. However, because certain of the master plans had been dropped from a recently published catalog, he sought to allocate the basis of those plans to the other master plans advertised in the current publication. Differences developed between the taxpayer and the Commissioner as a result of which the taxpayer was limited to a depreciation base some $11,000 less than the basis upon which the estate taxes had been assessed and paid.

When the case was first before us, we held that the taxpayer was entitled to depreciation on the cost basis of some fourteen master plans, which, though omitted from the most recent catalog, were still generating current income because orders were still being received for blue prints taken from them. We remanded the case to the Tax Court to recompute the allowable depreciation.[1]

Upon the remand, the Tax Court was of the opinion that our decision left it no discretion as to the applicable

[1] Johnson v. C.I.R., 270 F.2d 134.

rate of depreciation. It recomputed depreciation upon the basis of an estimate of a twenty-year life for the plans in controversy. Twenty years was also the estimated life of those master plans included in the most recent catalog.

When the case again came before us, we held that our remand was not intended to foreclose the Tax Court's determination of a proper rate of depreciation for these plans, and that the Tax Court should redetermine the rate based upon the relevant factual considerations.[2]

On the second remand, the Tax Court found that these master plans had a useful life of five years, and it allowed depreciation over that period on a straight line basis. The taxpayer brings the case here for the third time, contending that he should have been allowed to take depreciation on these plans on an accelerated basis proportional to actual sales during the five-year depreciable life of the plans. He supports this contention by sales data, which indicate that, of the total sales from these plans during the five-year period following the death of his father, some sixty per cent were made in the first year and approximately twenty per cent in the second year, the two tax years in question. He thus contends that he should have been allowed depreciation in the first year of sixty per cent of the basis of these plans and in the second year of twenty per cent of that basis.

Prior to the revenue act of 1954, a declining balance method for computing depreciation was sometimes allowed. It was available only if it was the method regularly employed by the taxpayer in keeping its books, it properly

[2] Johnson v. C.I.R., 284 F.2d 357.

reflected income during the taxable year, and the taxpayer had previously obtained the Commissioner's consent to use it.[3] The taxpayer, however, does not bring himself within the provisions of I.T. 3818. Not only had he not obtained the Commissioner's prior consent to the use of that method, but he did not keep his books upon that basis, and he was depreciating plans in catalogs, current during the tax years, on a straight line basis.

Treasury Regulations 111, § 29.23 (l)-3 provided that depreciation must be taken in equal annual instalments, or "in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production." An apportionment based upon units of production was allowable, however, only where there was an immediate correlation between units of production and realized depreciation. It was applicable principally to the extractive industries where the amount of available ore, itself, determined the useful life of property employed in its extraction.

Moreover, the taxpayer's approach is inconsistent with a well-recognized principle of tax accounting. As this Court has said:[4]

> "* * * The annual rate of depreciation must be fixed on the strength of circumstances obtaining before and during the year of the charge. * * *"

[3] See I.T. 3818, 1946-2 Cum. Bul. 42.

[4] Commissioner of Internal Rev. v. Superior Yarn Mills, 228 F.2d 736, 742.

Doubtless what is known and predictable at the time of the filing of the return may be considered in determining reasonable depreciation for the year involved, but *taxation is made too uncertain and controversies too long extended* if *what is claimed* or *allowable* as of the time the return is filed is made *subject to revision* and adjustment *by the Commissioner or by the taxpayer* in the *light of events occurring several years later*. What depreciation is allowable, therefore, is determinable on the basis of *facts known* or *reasonably predictable when the return is filed* and may not be made dependent upon gross sales actually realized in subsequent years.

The taxpayer's complaint that depreciation on a straight line basis did not permit the asset to be written off in steps proportionate to the receipt of gain ultimately realized from it is essentially criticism of a straight line method of depreciation. It is a criticism which the Congress recognized when it provided alternatives in the Revenue Act of 1954. Similar criticism is the basis of current advocacy of provision for still other alternatives. It is a criticism which could be as well directed to his depreciation of master plans still in current catalogs in 1951. With respect to them, too, or some of them, declining sales may be expected over their twenty-year life expectancy. When any one of them is dropped from further advertising, the rate of the decline of its sales will be accelerated. However, there is no basis now for a prediction of the gross sales of those plans over their twenty-year life, or for a determination of what portion of total sales will be realized in a given year.

Straight line depreciation, rough and imperfect though it is, was, in general, the only method available to taxpayers during 1951 and 1952. If the taxpayer thinks its applica-

tion, with respect to certain of his plans, is inequitable, it is no more so than to many another taxpayer who had no other alternative during those years. Since 1954, some taxpayers may have alternatives by which they may avoid or reduce the inequities of straight line depreciation, but there is no justification for a grant of extraordinary relief to this taxpayer for the tax years 1951 and 1952, relief which is not available to other taxpayers with respect to those years. Such relief had to come from the Congress. The Tax Court had no authority to grant it, and it properly required the use of the straight line method for depreciating these plans over the five years of their useful life.

Affirmed.

APPENDIX B

[Caption Omitted]

(Judgement)

On Petition to Review the Decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by the petitioner and by counsel for the respondent.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

Filed Apr. 27, 1962
R. M. F. Williams, Jr., Clerk

[Judges' names omitted]

APPENDIX C

ORDER

The Court having heretofore on April 27, 1962 entered its judgment and filed an opinion in the above entitled case and a petition for rehearing having been filed on May 24, 1962;

Now, therefore, upon consideration of the petition for rehearing,

IT IS ORDERED that the petition for rehearing be, and the same hereby is, denied.

[Judges' names omitted]

[Seal, Teste, etc., omitted]

APPENDIX D

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME

In computing net income there shall be allowed as deductions:

* * * * *

(l) [as amended by Sec. 121 (c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] DEPRECIATION. A *reasonable allowance* for the exhaustion, wear and tear (*including* a reasonable allowance for *obsolescence*)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111 (1939 Code):

SEC. 29.23 (l)-1. DEPRECIATION.—A *reasonable allowance* for the *exhaustion*, wear and tear, and *obsolescence* of property used in the trade or business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income, may be de-

ducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, obsolescence. The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (*not necessarily at a uniform rate*), *whereby* the *aggregate of the* amounts set aside, plus the salvage value, will, *at the end of the useful life* of the depreciable property, *equal the cost* or other basis *of the property* determined in accordance with section 113. Due regard must also be given to expenditures for current upkeep. * * *

* * * *

SEC. 29.23 (l)-5. METHOD OF COMPUTING DEPRECIATION ALLOWANCE.—The capital sum to be recovered shall be charged off *over the useful life of the property*, either in equal annual installments or in accordance with any other recognized trade practice, *such as an apportionment of the capital sum over units of production*. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. If the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable

year shall be limited to *such ratable amount* as may reasonably be *considered necessary to recover during* the *remaining useful life of the property the unrecovered cost* or other basis. The burden of proof will rest upon the taxpayer to sustain the deduction claimed. Therefore, taxpayers must furnish full and complete information with respect to the cost or other basis of the assets in respect of which depreciation is claimed, their age, condition, and remaining useful life, the portion of their cost or other basis which has been recovered through depreciation allowances for prior taxable years, and such other information as the Commissioner may require in substantiation of the deduction claimed.

A taxpayer is not permitted under the law to take advantage in later years of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years. * * *

* * * *

(Emphasis added by Petitioner)

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No. 884

In the Supreme Court of the United States

OCTOBER TERM, 1962

A. GLENDON JOHNSON, ADMINISTRATOR C.T.A. ESTATE OF A. GALEN JOHNSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 384

A. GLENDON JOHNSON, ADMINISTRATOR C.T.A. ESTATE OF A. GALES JOHNSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The initial memorandum findings of fact and opinion of the Tax Court (R. 27–37) [1] are not officially reported. The first opinion of the court of appeals is reported at 270 F. 2d 134. No findings of fact or opinion was filed by the Tax Court on the first remand. The second opinion of the court of appeals is reported at 284 F. 2d 357. The supplemental memorandum findings of fact and opinion of the Tax Court on the second remand (R. 70–74) are not officially reported. The third opinion of the

[1] "R." refers to the respondent's separately bound Appendix B in the court below.

court of appeals (Pet. App. A) is reported at 302 F. 2d 86.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1962 (Pet. App. B). A petition for rehearing was denied on May 31, 1962 (Pet. App. C). The petition for a writ of certiorari was filed on August 29, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the taxpayer was entitled to depreciate 25 house plans on the basis of the proportion of the sales during the tax years to the total sales during the depreciable life of the plans.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 23 of the Internal Revenue Code of 1939 and Sections 29.23(l)–1 and 29.23(l)–5 of Treasury Regulations 111 (1939 Code) are set forth in the Appendix, *infra*, pp. 8–10.

STATEMENT

The taxpayer is the administrator, c.t.a., of the estate of A. Gales Johnson, who conducted a mail order service selling house plans based on original designs prepared by him and his staff. At the time of A. Gales Johnson's death, there were in his possession 125 original master plans from which blueprints and material lists were prepared. For estate tax purposes these plans were valued at $173,055,

based on their reproduction value (R. 28–30). Before A. Gales Johnson's death, 25 of these plans had been dropped from current brochures but orders for them were still being received (R. 30). In computing the depreciation deduction on the house plans in his fiduciary income tax return for the fiscal year ending August 31, 1951, the taxpayer removed the 25 plans from the depreciation base and used $173,055 (the estate tax value of the 125 plans) as the value of 100 plans. Using an estimated useful life of 20 years, he claimed a depreciation deduction in the amount of $7,612.75. This was five percent of the asserted value of the 100 plans ($173,055) reduced by an amount petitioners deducted as obsolescence on 18 additional plans ($20,800) which, although printed in the brochures, it was decided were out of favor with the public and should not be carried in the brochures in the future. See *Johnson* v. *Commissioner*, 270 F. 2d 134, 135.

In his notice of deficiency, the Commissioner determined that the 25 plans which were dropped before A. Gales Johnson's death were not obsolete because orders were still being received for them during the taxable years in question (fiscal years 1951 and 1952). Accordingly, he valued the 25 plans at $13,567.51, which was $11,659.99 less than the value ($25,227.50) that had been attributed to them for estate tax purposes, thus reducing the depreciation basis claimed by the taxpayer ($173,055) by $11,659.99 (R. 32–33). The Commissioner's determination in this connection was sustained by the Tax Court because of the tax-

payer's failure to rebut it (R. 35–37). On the first appeal, the court below, reversing in part, held that the depreciation base for all 125 plans was $173,055 (the estate valuation) and gave the Commissioner the option of allocating that amount among the 125 plans according to their reproduction value or of using his $13,567.51 valuation for the 25 plans but allocating the reduction in their value ($11,659.99) among the other 100 plans in any reasonable way. 270 F. 2d at 136. (Of the 100 plans, the Commissioner had determined that 14, instead of the 18 claimed by the taxpayer, were obsolete. The Tax Court and court of appeals upheld that determination (see 270 F. 2d at 136) and the point is no longer in issue.)

On remand, the parties were ordered by the Tax Court to submit computations for entry of decision in accordance with the court of appeals' opinion. The Commissioner filed a computation which allocated the $173,055 depreciation base among the 125 plans, reduced the amount by the amount the taxpayer was allowed to deduct for obsolescence of the 14 plans mentioned above (not included in the 25 plans), and allowed depreciation on the remaining plans over the estimated life of 20 years which the taxpayer had used in his returns for his house plans. A counter-computation and memorandum was filed by the taxpayer urging that depreciation be allowed on the 25 plans at an increased rate based on the sales of those plans. This computation was rejected by the Tax Court, which entered its decision on the basis of the Commissioner's computation (R. 42–59). On the taxpayer's second appeal,

the court of appeals held that the question regarding the depreciation rate was not foreclosed as a new issue and remanded the case for further proceedings. It ordered the Tax Court to determine the proper rate of depreciation on the 25 plans "on the merits, after considering *all* the facts, in order to work out a just result in this difficult situation, even though a large part of the difficulty was created by taxpayer himself." *Johnson* v. *Commissioner*, 284 F. 2d 357, 359.

On the second remand, the taxpayer offered no additional evidence with regard to depreciation on the 25 plans, stating that none was needed (R. 72). Instead, he resubmitted (R. 75–76) the computation previously submitted after the first appeal (R. 42–59), in which he urged that depreciation be allowed on the 25 plans at an increased rate based on the sales of those plans. With no additional evidence on which to make a finding, the Tax Court reviewed the record of the original hearing (which contained no estimates of the useful life of the 25 dropped plans (see R. 72–74)) and found as a fact that the useful life of the plans was five years and the rate of depreciation, accordingly, 20 percent for the taxable years. The court of appeals affirmed (Pet. App. B) and denied the taxpayer's petition for rehearing (Pet. App. C).

ARGUMENT

The taxpayer has not, either in the court below or in this Court, attacked the finding of the Tax Court that the 25 plans had a remaining useful life of five years. Rather, his argument, as the court below stated (Pet. 13), is that he should be allowed to depreciate the 25

plans during the two taxable years on an accelerated basis proportional to actual sales made during the entire depreciable life of the plans. This contention is without merit.

Depreciation, for which a deduction is allowed under Section 23(l) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 8), extends by its very nature over the useful life of the property in the business. See *Massey Motors* v. *United States*, 364 U.S. 92. The Treasury Regulations under the 1939 Code allowed depreciation "in accordance with a reasonably consistent plan" over the useful life of the property including "equal annual installments or * * * any other recognized trade practice, such as an apportionment of the capital sum over units of production." Treasury Regulations 111, Section 29.23(l)–1 and 5, Appendix *infra*, pp. 8–10. We submit that the taxpayer cannot, consistently with the regulations and indeed the basic logic of our revenue system, apportion depreciation on the basis of actual sales over the depreciable life of the plans.

First, the period covered by income tax returns under the tax laws is a single year. The Treasury Regulations provide that the reasonableness of any claim for depreciation is to be determined "upon the conditions known to exist at the end of the period for which the return is made." Treasury Regulations 111, Section 29.23(l)–5. The taxpayer's proposed method of depreciation, however, cannot possibly be computed at the end of an annual accounting period since total sales over a period including subsequent years are obviously unknown.

Second, the Regulations require that taxpayers follow "a reasonably consistent plan" for depreciation. Treasury Regulations 111, Section 29.23(l)-1. Since the taxpayer used the straight line method in the tax years in computing his depreciation allowances on all his other house plans, he was required to use this same method for the 25 plans here in issue.

Finally, the Regulations under the 1939 Code require that, if a taxpayer utilizes a depreciation method other than the straight line method, he must show that it is "a recognized trade practice." The taxpayer here has made no showing of any trade practice of computing depreciation on the basis of sales during the particular year in relation to total sales over the entire life of the asset.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(l) [as amended by Section 121(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * * *

Treasury Regulations 111 (1939 Code):

SEC. 29.23(l)-1. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income, may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property,

equal the cost or other basis of the property determined in accordance with section 113. Due regard must also be given to expenditures for current upkeep. * * *

* * * * *

SEC. 29.23(l)–5. *Method of Computing Depreciation Allowance.*—The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. If the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably be considered necessary to recover during the remaining useful life of the property the unrecovered cost or other basis. The burden of proof will rest upon the taxpayer to sustain the deduction claimed. Therefore, taxpayers must furnish full and complete information with respect to the cost or other basis of the assets in respect of which depreciation is claimed, their age, condition, and remaining useful life, the portion of their cost or other basis which has been recovered through depreciation allowances for prior taxable years, and such other information as the Commissioner may require in substantiation of the deduction claimed.

A taxpayer is not permitted under the law to take advantage in later years of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years. * * *

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